86-596

No. .....

Supreme Court, U.S.
FILED
OCT 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1986

GLEN SUTHERLAND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Submitted By:

TEXAS S. WARD
Attorney for Petitioner
4150 Pinnacle, Suite 217
El Paso, Texas 79902
Phone (915) 533-5697

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

1. Whether Petitioner is entitled to a full and fair hearing on all of the files and records of the case in his 28 U.S.C. 2255 Motions in the same proceeding concerning alleged facts supported by affidavits, that if true, would require a new trial.

2. Whether the Trial Court is required to hear in one proceeding all 28 U.S.C. 2255 Motions, files and records of the case, the issues and alleged facts, supported by affidavits, concerning the same matter filed in the same proceeding, that if true, would require a new trial, rather than hearing the matter piece-meal. Some of the facts were discovered and the information was filed with the Court and brought to the Court's attention after the hearing on the original motion, but before the Court's decision.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
PETITION FOR A WRIT OF CERTIORARI	1
CITATIONS TO OPINIONS BELOW	2
JURISDICTION	2
STATEMENT OF THE CASE	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
SUMMARY OF THE ARGUMENT	4
REASONS WHY THE WRIT SHOULD BE GRANTED	5
QUESTIONS RESTATED	6
ARGUMENT AND AUTHORITIES	6
INEFFECTIVE COUNSEL, CONFLICTS	10
INEFFECTIVE REPRESENTATION—HARM	12
NO ABUSE OF WRIT	14
RULES ARE TO PROVIDE JUSTICE	14
CONCLUSION	16
PRAYER	17
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page

CASES:

Baker v. Estelle, 715 F.2d 1031 14

Davis v. Alaska, 415 U.S. 308, 39 L. Ed.2d 347 (1974) 11

Hallowell v. United States, 197 F.2d 926 (5th Cir. 1952) 9

Hamilton v. McCoter, 772 F.2d 171 (5th Cir. 1985) 15

Porter v. U.S., 298 F.2d 461 (5th Cir. 1962) 7

Sanders v. United States (Sup. Ct.1963) 373 U.S. 1, 10 L. Ed.2d 148, 83 S.Ct. 1068 ..... 11, 14, 15

Townsend v. Sain, 372 U.S. 293, 9 L. Ed.2d 770, 83 S.Ct. 745 9

United States v. Martinez, 630 F.2d 361 (5th Cir. 1980) 12

U.S. v. Sutherland, 656 F.2d 1181 (1981) 2, 12

U.S. v. White, 706 F.2d 506 (5th Cir. 1983) 11

STATUTES:

28 U.S.C. 1254(1) 2

28 U.S.C. 2255 ..... *passim*

OTHER AUTHORITIES:

Supreme Court Rule 20 2

No. .....

———o———

In The

Supreme Court of the United States

October Term, 1986

———o———

GLEN SUTHERLAND,

Petitioner.

v.

UNITED STATES OF AMERICA,

Respondent.

———o———

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

———o———

PETITION FOR A WRIT OF CERTIORARI

———o———

The Petitioner, Glen Sutherland, respectfully prays for a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 20, 1986.

CITATIONS TO OPINIONS BELOW

This case concerns two 28 U.S.C. 2255 Motions that were filed pertaining to a criminal case reported as *U.S. v. Sutherland*, 656 F.2d 1181 (1981). The United States District Court for the Western District of Texas entered a judgment denying Petitioner's 28 U.S.C. 2255 Motions On January 22, 1986, without considering all the files and records of the case including Petitioner's motions showed that Petitioner was entitled to a hearing. The Circuit Court of Appeals refused to consider the matter since the District Court had not considered it in an opinion dated January 22, 1986, and the Appeals Court did not return the case for a full and fair hearing. Petitioner's Motion for Rehearing was denied August 20, 1986. The Judgments, Orders and Opinions are reproduced herein in the Appendix.

———o———

JURISDICTION

The Judgment of the United States District Court was affirmed by the United States Court of Appeals. The Petitioner's Petition for Rehearing was denied on August 20, 1986. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Supreme Court Rule 20.

———o———

STATEMENT OF THE CASE

Petitioner in his two 28 U.S.C. 2255 motions and an Addendum added to the second motion alleged facts and furnished affidavits that, if true, were grounds upon which Appellant would be entitled to relief. Such grounds included (1) ineffective counsel resulting from three conflicts and (2) ineffective counsel plus harm to the extent of reversible error, (3) perjury during the trial on the part of three prosecution witnesses, with government knowledge at the time of the perjury and (4) bias on the part of three government witnesses, who committed perjury concerning material matters, that was not presented to the jury by the defense attorney. The alleged facts, if true, present other grounds for a new trial. The facts alleged also show a great need for a complete and fair evidentiary hearing concerning all the alleged facts and affidavits.

The Trial Court failed to give Petitioner a full and fair hearing and failed to consider the Addendum before he made his decision.

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case is 28 U.S.C. 2255. ". . . Unless the *motion, and the files and records of the case* conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings

of fact and conclusions of law in respect thereto. . . ." (Emphasis Added).

———o———

SUMMARY OF THE ARGUMENT

Petitioner filed two 28 U.S.C. 2255 type Motions for hearings and relief. Petitioner also requested to be allowed to submit interrogatories, request for admissions, depositions and other forms of discovery. The Trial Court took no action except to give the Government extra time to respond. On one occasion the Government asked for time to get an affidavit but failed to do so. Petitioner was allowed a limited hearing concerning attorney conflict resulting from the fact that Petitioner's trial attorney had failed to inform Sutherland that he had represented a Government witness concerning a theft case. The Trial Court held there was no conflict because the theft case was dismissed. The Trial Court did not consider that the Attorney could have used the theft case to show bias since the case could have been refiled at the time the witness became a Government witness. The Petitioner learned new facts and issues concerning the bias of Government witnesses, perjury of government witnesses with Government knowledge, additional conflicts of the defense attorney and some of the reasons for his failure to properly defend Petitioner in the criminal trial. These facts were discovered as a result of the limited hearing and Petitioner filed an addendum or additional pleadings covering new issues and information and facts about the old pleadings. Petitioner was unable to discover the additional facts until after the limited hearing. The Trial

Court failed to allow Petitioner a hearing concerning the additional issues and facts even though Petitioner filed a motion requesting a hearing.

Petitioner is entitled to a full and fair hearing concerning all the facts presented in the motions, files and records of the case filed before a final decision in the case, that if true would require a new trial. The facts alleged in the motions, files and records of the case show that Petitioner is entitled to a full and fair hearing concerning them. This has been denied Petitioner.

To allow the Trial Court to pick out parts of Petitioner's factual allegations and allow only a limited hearing on special parts is to deny the reason for a 28 U.S.C. 2255 case and is contrary to the wording and the intent of the statute, the prior holdings of this Court and the habeas corpus right created by common law.

—o—

REASONS WHY THE WRIT SHOULD BE GRANTED

The questions raised in this application for writ of certiorari are important to the public, the courts, and persons applying for habeas corpus types of hearings because it is in the best interests of all to have complete and fair hearings concerning all the known facts that are material before the Trial Court's decision, when possible. To do otherwise is contrary to the prior holdings of this Honorable Court and contrary to the common law.

To have a full and fair hearing concerning the entire additional facts known prior to the decision of the Trial

Court will be cheaper, it will save time for the Trial Courts and the Appellate Courts, the facts developed will be easier to understand, and this procedure will comply with the prior holdings and spirit of the prior holdings of this court and the common law.

———o———

QUESTIONS RESTATED

1. Whether Petitioner is entitled to a full and fair hearing on all of the files and records of the case in his 28 U.S.C. 2255 Motions in the same proceeding concerning alleged facts supported by affidavits, that if true, would require a new trial.

2. Whether the Trial Court is required to hear in one proceeding all 28 U.S.C. 2255 Motions, files and records of the case, the issues and alleged facts, supported by affidavits, concerning the same matter filed in the same proceeding, that if true, would require a new trial, rather than hearing the matter piece-meal. Some of the facts were discovered and the information filed with the Court and brought to the Court's attention after the hearing in the original motion, but before the Court's decision.

———o———

ARGUMENT AND AUTHORITIES

The two questions will be argued together for clarity and convenience.

Petitioner discovered, after filing his 28 U.S.C. 2255 Motions concerning a conflict that his attorney had at the time of the trial, new facts that would help prove the prior allegations and also prove new issues and provide reasons for the ineffectiveness of counsel. Petitioner filed these in a document called an "Addendum" rather than file new 28 U.S.C. 2255 Motions. On January 3, 1986, Petitioner filed a "Motion For An Immediate Hearing And Decision" with the Trial Court. Said motion included the following on page 3, paragraph IV:

> "Petitioner would further request an immediate hearing concerning his Addendum filed in this case or in the alternative that the Court make an immediate ruling concerning Petitioner's case. Petitioner's writ in this case was filed on or about January 11, 1984. The Magistrate's decision was filed on or about March 6, 1984. Petitioner is entitled to a prompt hearing and decision. See *Porter v. U.S.*, 298 F.2d 461 (5th Cir. 1962)."

Petitioner followed the procedure set out by 28 U.S.C. 2255 Rules that provides that he file two copies of his Petition, motions and documents with the District Clerk of the Trial Court. This procedure was followed in Petitioner's first Habeas Corpus Petition and Petitioner filed additional facts, evidence and law as they were discovered or became applicable. This was recognized by the Trial Court on July 15, 1983, when the Trial Court ordered the Respondent to show cause by August 15, 1983, why the relief sought should not be granted. The Trial Court also granted an extension of time for the Government to answer, but it never did. Even though Petitioner had requested relief and it is obvious that the Trial Court recognized the pleadings and the requests for discovery since

he issued orders concerning them, they were effectively denied by the Court's refusal to otherwise act. This also occurred in Petitioner's second Habeas Corpus motion with the exception that a limited hearing was allowed. New evidence was discovered after the new hearing and the evidence and the law concerning it was brought to the Court's attention in the same way as in the first Habeas Corpus. That is, two copies of the pleadings, law and affidavits were filed with the District Clerk. Motions for discovery included requests for production, interrogatories, and admissions. The motions were never acted upon, with the exceptions of the hearing concerning Gandara, and the Trial Court allowed the Government extra time to reply.

Petitioner has not been allowed a full and fair evidentiary hearing concerning the issues raised by his Petitions and pleadings. We pray that this Honorable Court will return this case to the Trial Court for a full and fair hearing concerning all of the facts alleged in the case or in the alternative instruct Petitioner and the Trial Court what matters should be included in a new habeas corpus petition. This case is one that provides the Court with an excellent chance to clarify what procedure should be followed where additional facts are learned after the habeas corpus petition is filed.

The facts alleged show that Petitioner is entitled to relief. No abuse of writ has been alleged contesting this fact. The Trial Court had in his possession all of Petitioner's pleadings, motions and affidavits and failed and refused to give Petitioner a full and fair hearing.,

This Honorable Court has held many times that an applicant in a habeas corpus case has a right to a full and fair hearing. The Court stated in *Townsend v. Sain,* 372 U.S. 293, 312, 9 L.Ed.2d 770, 785, 83 S.Ct. 745 that:

> "Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding."

The Court also stated:

> "Even if the same ground was rejected on the merits on a prior application, it is open to the applicant to show that the ends of justice would be served by permitting the redetermination of the ground. *If factual issues are involved, the applicant is entitled to a new hearing upon showing that the evidentiary hearing on the prior application was not full and fair—."* (Emphasis added).

Obviously, Petitioner is entitled to a full and fair hearing in this case concerning all of the allegations. He has never been given a full and fair evidentiary hearing. The question is whether or not it should be heard all together or piecemeal as discussed later. The 5th Circuit has held several times that an applicant in a habeas corpus case has the right to a full and fair hearing. See *Hallowell v. United States,* 197 F.2d 926 (5th Cir. 1952).

The issue of ineffective counsel under the 5th and 6th Amendments to the Constitution had never been presented to the Honorable 5th Circuit Court of Appeals or to the Trial Court by Sutherland previous to the time of the filing of the present petitions and pleadings and this appeal. It was not presented on direct appeal. We will

discuss some of the facts concerning ineffective counsel to give an example.

———o———

INEFFECTIVE COUNSEL, CONFLICTS

The defense attorney, Caballero, had conflicts that included at least (1) the fact that the attorney had previously represented a major prosecution witness named Gandara in a county court theft case and had gotten the case dismissed through illegal means and that she was still subject to being prosecuted for the theft case and the illegal dismissal (compounding) at the time of the investigation of Petitioner in this case and that attorney Caballero was subject to being charged with a crime for the illegal dismissal (compounding) and (2) Attorney Caballero was being investigated in the same case as Petitioner for RICO violations concerning bribery and (3) that Attorney Caballero made an agreement with the other defense counsel (who had similar conflicts) to withhold information from the jury that showed Petitioner's innocence. This was done in order to protect the defense attorneys. The evidence concealed by the defense Attorneys, if presented, would have reflected adversely on the said defense attorneys personally, but would have showed the innocence of Petitioner.

The Trial Court in the limited habeas corpus hearing made the narrow holding that Gandara's arrest for theft could not have been used in Petitioner's case to show bad character because it was a misdemeanor and was dismissed, therefore it had no effect on the case. The holding misses the point. The evidence showed that attorney Caballero had something to hide and that he had a

conflict. The evidence presents at least one reason (conflict) Attorney Caballero did not properly defend appellant. Even though Gandara's arrest for theft could not be shown to prove her bad character, it could have been shown to prove bias. The possible refiling of the dismissed case plus the fact that in another sworn proceeding defense Attorney Caballero testified to facts that show that Government witness Gandara's theft case was dismissed illegally by "Compounding". See the Trial Court's Finding in Appendix 7, page 26, n. 3. Compounding was a criminal offense at the time under Texas law. Also giving a witness something of value to obtain a dismissal of a criminal offense was bribery under Texas Penal Code 36.05, a felony, at the time. We ask this Court to take judicial knowledge of these laws. Said offenses could be used to show bias and the reason for ineffective counsel. See *Davis v. Alaska,* 415 U.S. 308, 39 L. Ed.2d 347 (1974). Timely objections were made.

Petitioner is entitled to a full and fair hearing concerning the defense attorney's conflicts:

> "The statute in terms requires that a prisoner shall be granted a hearing on a motion which alleges sufficient facts to support a claim for relief unless the motion and the files and records of the case conclusively show that the claim is without merit." *Sanders v. United States* (Sup. Ct.1963) 373 U.S. 1, 10 L. Ed. 2d 148, 83 S. Ct. 1068.

There is nothing in the record of the case that would show that Petitioner's habeas corpus claims are without merit.

Where the defense attorney has a reason to look after himself rather than his client there is an obvious conflict of interest and harm is presumed. See *U.S. v.*

White, 706 F.2d 506 (5th Cir. 1983) where the attorney was being represented by an attorney who was being investigated in the same investigation (escape). See also *United States v. Martinez,* 630 F.2d 361 (5th Cir. 1980) that states a criminal defendant has a right to an attorney who is conflict-free, otherwise reversal is automatic.

———o———

INEFFECTIVE REPRESENTATION—HARM

Petitioner is entitled to a full and fair hearing concerning the defense attorney's ineffective representation.

The Honorable 5th Circuit Court of Appeal pointed out on direct appeal in *U.S. v. Sutherland* 656 F.2d 1181 (1981), while deciding other issues, that the defense attorney, Caballero, waived Appellant's right in at least four instances, to wit: (1) Brady material, (2) the right to a severance of the different alleged RICO counts, (3) the right to have a JAMES case type hearing at the end of the case and (4) the right to be tried under the correct theory of conspiracy or the "Enterprise" theory rather than the "wheel" theory.

Each of the above waivers did great harm, but the Appeals Court ruled that individually each waiver did not amount to "plain error", therefore the Defendant Sutherland was bound by his trial attorneys waivers. However, each waiver and other evidence of ineffective counsel must be considered collectively with the newly discovered evidence for justice under the 5th and 6th Amendments of the Constitution to correctly determine whether or not counsel was effective. It seems that for the "plain error" test you have to assume a premise that

everything else was done right except the matter being tested. It does not allow the Court to check the entire case to see if other elements of the case were colored by the same brush. The error is not reversible error "where the error does not reach constitutional level and had no substantial influence and there was enough to support the result apart from the phase affected by the error". *United States v. Rodriguez,* 573 F.2d 330, 333 (5th Cir. 1078). It matters not if the remaining evidence was also allowed to be presented to the jury through error, if the error for each piece by itself was not substantial. The whole trial could be tried on evidence that was not admissible and on wrong theories of the law if the defense attorney does not object and each item of evidence by itself was not substantial (as in circumstantial cases such as this one). The only relief a defendant can obtain is by proving ineffective counsel. Here an opportunity is provided to show the cumulative effect of the errors and that Petitioner, in truth, did not have an attorney to represent him during the trial.

Numerous other fact allegations of harm are alleged in Petitioner's Petitions. They include bias by at least three of the government's witnesses, including crimes that the witnesses had committed which were still subject to prosecution, all of which was known by the governemnt at the time the witnesses were placed on the stand. The defense attorney knew about the bias and did not present it to the jury. Perjured testimony and false information concerning material matters in the case was given by the government witnesses before the jury which both the government and the defense counsel knew were false.

———————o———————

NO ABUSE OF WRIT

No abuse of writ was pled by the government. There can be no claim that Petitioner's claims have already been decided. *Baker v. Estelle,* 715 F.2d 1031, 1034. See also *Sanders v. United States,* 373 U.S. 1, 83 S.Ct. 1068, 10 L. Ed.2d 148 (1963).

———o———

RULES ARE TO PROVIDE JUSTICE

It has been held many times by both this Honorable Court and the 5th Circuit that habeas corpus hearings should not be done piecemeal. The Courts have also held that a habeas corpus is to do justice and that the trial court should adopt any appropriate means to provide justice. The trial court should ascertain all possible grounds upon which the habeas corpus applicant might claim to be entitled to relief. The opposite was done in Petitioner Sutherland's case. In Petitioner's case the Trial Court should have treated Petitioner's Addendum as properly filed (if it was not properly filed) when the motion for a hearing concerning the Addendum was filed. A full hearing would not unduly delay the proceedings because the case had been pending for over a year anyway (contrary to the rules).

The rules of 28 U.S.C. 2255 provide for the habeas corpus hearing and provide a procedure for justice. Rule 15 of the Rules of Civil Procedure which require a Plaintiff to get permission to file any additional pleadings does not apply to a 2255 hearing because the Clerk and

the Court have the duty to return the pleadings if they are not permissible and tell the applicant what he has done wrong. This is clearly an attempt to assist persons to reach justice, which is the purpose of habeas corpus cases according to this Honorable Court.

The Trial Court was presented all of the documents on file in this case. Each document was filed in duplicate in the Federal District Clerk's office and it was the Clerk's duty to present it to the Judge. We believe we have a right to assume the documents were all presented to the Judge since there was no allegation that the Clerk did not do his duty.

A habeas corpus matter should not be tried piecemeal if a full and fair hearing can be provided. *Sanders v. United States*, 373 U.S. 1, 18, 10 L. Ed. 148, 163, 83 S. Ct. 1068. "The purpose of [Rule 9(b)] is to avoid piecemeal litigation, with petitioners advancing one at a time." *Hamilton v. McCotter*, 772 F.2d 171 (5th Cir. 1985). Petitioner has attempted to present to the Trial Court all the facts that show that he had ineffective counsel or defense counsel in name only. Petitioner should not be required to present the matter piecemeal because he discovered some of the facts after he filed his habeas corpus petition. The procedure for a habeas corpus, as described by the Supreme Court in the *Sanders v. United States*, 373 U.S. 1, 18, 10 L. Ed. 148, 163, 83 S. Ct. 1068, supra, is to provide justice and the Court states in 10 L. Ed. 2d 163 the following: "*—and if the ends of justice demand, the duty—to reach the merits.*" The Court suggests that if the pleadings are not sufficient that the better course is to direct the peititioner to amend his motion, rather than dismiss the application. The

Court states in 10 L. Ed.2d 165, when speaking of the Trial Judge:

> "He is free to adopt any appropriate means for an inquiry into the legality of the prisoner's detention in order to ascertain all possible grounds upon which the prisoner might claim to be entitled to relief."

It is clear that this Court's holdings do not limit a habeas corpus petitioner's rights, even if he fails to make a personal presentation to the judge and request that he be allowed to file them with the clerk, as suggested by the prosecution in this case.

The Court in the above case also points out that there is no statute of limitations on a habeas corpus case and no laches. The Court points out on page 156 of Lawyer's Edition 2d that the statute 28 U.S.C.A. 2255 does not make an application for habeas corpus more difficult than the common law but merely makes a habeas corpus, under the statute, easier to do justice.

———o———

CONCLUSION

Petitioner was not given a full and fair evidentiary hearing as required by the statute and the holdings of this Honorable Court concerning the issues and facts pled in his habeas corpus petitions. The facts show matters that have not been decided before. The facts pled entitle Petitioner to a hearing and, if found to be true as the affidavits show, entitle him to a new trial. The effect of the present status is that the right of habeas corpus has been abridged by the same court that is constitutionally bound to protect it.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellant Sutherland respectfully requests that Court grant this petition and remand the case to allow development of the facts for the reasons set forth in this Brief and that he have such other and further relief as the Court deems just and proper. The petition for Writ of Certiorari should therefore be granted.

Respectfully submitted,

TEXAS S. WARD
Attorney for Appellant
State Bar No. 20847000
4150 Pinnacle, Suite 217
El Paso, Texas 79902
(915) 533-5697 or 532-4133

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-1119

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GLEN SUTHERLAND,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

ON PETITION FOR REHEARING
(Filed August 20, 1986)

Before GEE, RANDALL, and DAVIS, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Thomas Gilbert Gee
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-1119
Summary Calendar

D.C. Docket No. EP-83-CA-221 (79-CR-189)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GLEN SUTHERLAND,

Defendant-Appellant.

Appeals from the United States District Court for the Western District of Texas

Before GEE, RANDALL, and DAVIS, Circuit Judges.

JUDGMENT
(Filed September 8, 1986)

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

July 23, 1986

ISSUED AS MANDATE: September 2, 1986

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-1119
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GLEN SUTHERLAND,

Defendant-Appellant.

Appeals from the United States District Court for the Western District of Texas

(Filed July 23, 1986)

Before GEE, RANDALL and DAVIS, Circuit Judges.
PER CURIAM:*

Sutherland, a former municipal judge, whose RICO conviction for a ticket-fixing conspiracy has already received our careful attention on direct appeal,[1] appeals the denial of his motion to vacate sentence pursuant to 28 United States Code Section 2255. Many of the contentions which he seeks to draw before us were not presented to the trial court or considered by it, and we consequently decline to take them up. Those which were are correctly disposed of by that opinion. Upon the basis of it, the judgment of the trial court is

AFFIRMED.

---

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

[1] United States v. Sutherland, 656 F.2d 1181 (5th Cir. 1981).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

EP-84-CA-10 EP-79-CR-189

GLEN SUTHERLAND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ORDER DENYING
MOTION TO VACATE SENTENCE
(Filed January 22, 1986)

This is a motion to vacate sentence under 28 U.S.C. § 2255.[1] Petitioner Sutherland was charged by indictment with conspiring to conduct the affairs of an enterprise through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(d).[2] Sutherland, who was then a Judge of the Municipal Court of the City of El Paso, was accused of accepting bribes from two Codefendants, Grace Walker and Edward Maynard, in return for his services in dismissing traffic tickets accumulated by friends, associates, and "clients" of Walker and Maynard. The jury

---

[1]The Petitioner styled his action a motion for a coram nobis. However, it has been treated throughout as a motion to vacate sentence under Section 2255.

[2]Petitioner was accused in the same indictment of willful failure to file income tax returns in three separate years. In a separate trial on these charges, Petitioner was found guilty on all counts. Those convictions and the sentences imposed are not at issue in the present motion to vacate sentence.

found Sutherland and his Codefendants guilty of RICO conspiracy, and each was sentenced to two years' imprisonment in the custody of the Attorney General. Sutherland's conviction was affirmed on direct appeal, and the Supreme Court denied certiorari. *United States v. Sutherland,* 656 F.2d 1181 (5th Cir. 1981), *cert. denied* 455 U.S. 949 (1982). A previous motion to vacate sentence was denied in 1982. In the present motion for post-conviction relief, Sutherland claims that he was denied effective assistance of counsel because his retained attorney, Raymond C. Caballero, had an undisclosed conflict of interest.

The evidence in this case shows that in 1979 the El Paso Police Department and the Federal Bureau of Investigation obtained information that Codefendant Maynard, an ex-police officer who was engaged in the real estate business, had a ticket-fixing arrangement with Judge Sutherland. The Police Department recruited several women "civilians" to work undercover in an effort to gain evidence against Maynard and indirectly against Sutherland. These women were equipped with transmitters or "body mikes," and were sent to Maynard's office to seek to engage his services with regard to the dismissal of traffic tickets. The opinion of the Court of Appeals for the Fifth Circuit described this operation in the following words:

> "The government case as to the Maynard-Sutherland conspiracy rested chiefly on testimony concerning a series of meetings in which persons cooperating with the FBI in mid-1979 sought help from Maynard with their traffic tickets (some of which were written for the purpose of the investigation). In each instance, Maynard appeared to call someone to ask the cost of taking care of a ticket; although he did not re-

> fer to Sutherland by name during the phone conversations, he referred to his contact as 'the Honorable' and indicated that the contact was the only judge handling night court, which was in fact Sutherland's assignment. Moreover, Maynard referred to his activities as 'fixing' or 'taking care of' the citations, and insisted on payment in cash." *United States v. Sutherland, supra* at 1188.

One of the women who visited Maynard in an undercover capacity was Patricia Gandara. Ms. Gandara testified at the trial concerning her conversations with Maynard, and also identified the recorded conversations which were introduced in evidence and played for the jury. Petitioner Sutherland now contends that he learned after the trial that Attorney Caballero had previously represented Ms. Gandara in connection with a shoplifting case, and that this relationship, allegedly undisclosed to Sutherland, gave rise to a conflict of interest on the part of his defense attorney which prejudiced his defense.

Facts developed in an evidentiary hearing held by the Magistrate indicate that Patricia Gandara was charged with shoplifting merchandise from the Popular Department Store in December 1977. Ray Caballero was retained to represent her in connection with these charges. Ms. Gandara entered a plea of not guilty, and her case was set for trial. Caballero later persuaded the County Attorney to dismiss the complaint against Ms. Gandara, and it was in fact dismissed on April 13, 1978. The attorney-Client relationship between Gandara and Caballero ended with that dismissal. Caballero never represented Gandara again with respect to this or any other matter, criminal or

civil.[3] The trial of the instant case, in which Caballero represented Petitioner Sutherland, occurred in February and March 1980.

In order to demonstrate a violation of his rights under the Sixth Amendment, the Petitioner has the burden of establishing that an actual conflict of interest adversely affected his lawyer's performance. *Cuyler v. Sullivan*, 446 U.S. 333, 351 (1980). Unless he can show that his attorney actively represented conflicting interests, he has not established the constitutional predicate for a claim of ineffective assistance of counsel. *Cuyler v. Sullivan, supra.* Sutherland has failed to make the requisite showing in this case. Attorney Caballero did not represent Sutherland and Gandara at the same time. On the contrary, his representation of Gandara ended almost two years before Sutherland's trial. Furthermore, the record clearly establishes that Caballero did not obtain any confidential or privileged information by virtue of his representation of Gandara that he was duty bound to use in connection with his defense of Sutherland. The fact of Gandara's arrest for shoplifting was not privileged; it was a matter of public record, and regardless of the way in which defense counsel became aware of the arrest, he could not use it to impeach Gandara. It is well settled that even a conviction for the offense of shoplifting punishable by one year or less in prison is not admissible in evidence to impeach a witness. *United States v. Entrekin*, 624 F.2d 597, 598 (5th

---

[3]Part of the consideration for the County Attorney's agreement to dismiss the criminal charge was Ms. Gandara's agreement not to bring a civil action against the Popular for false arrest or malicious prosecution.

Cir. 1980); *United States v. Barnes,* 622 F.2d 107, 109-110 (5th Cir. 1980); *United States v. Ashley,* 569 F.2d 975, 978-9 (5th Cir. 1978). The arrest alone, absent a conviction, would clearly be inadmissible under any circumstances. The record fails to indicate that Caballero obtained any information through representing Gandara to the effect that she had a bad reputation for truth and veracity, or that any other basis existed to impeach her credibility. (Transcript of hearing p. 85). In short, the Petitioner has wholly failed to carry his burden of demonstrating that an actual conflict of interest existed by virtue of Caballero's prior representation of Gandara.

The Petitioner also contends that Attorney Caballero rendered ineffective assistance of counsel in failing to bring out through his cross-examination of Gandara that she was able to observe Maynard dialing his own telephone number on one occasion when he was pretending to talk with Sutherland. See *United States v. Sutherland, supra* at 1188. Caballero explained that he made a tactical decision to bring out this point in the cross-examination of FBI Agent Youngblood rather than Gandara, because he and Maynard's attorneys perceived this as an "opportunity to challenge the credibility of the Government's case," and "show that he was deceiving the jury" (Tr. 41-42).[4]

In *Strickland v. Washington,* — U.S. —, 104 S.Ct. 2052 (1984), the Supreme Court set the standard to be applied by lower courts in reviewing ineffective assistance claims in post-conviction proceedings. In the course of its opin-

---

[4]The FBI had placed a pen register on Maynard's telephone, and Agent Youngblood was aware from the pen register records that Maynard had on some occasions dialed his own telephone number when purporting to speak with Sutherland.

ion, the Supreme Court stated the following at 104 S.Ct. 2066:

> ". . . A court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."

In the instant case, the record does not suggest even in the light of hindsight that Caballero's strategy decision was improper or that it constituted ineffective assistance of counsel. Even though the strategy did not "work," in the sense of obtaining an acquittal for his client, it was clearly an exercise of reasonable professional judgment. The Petitioner's claim of ineffective assistance of counsel in this regard is without merit.

The Petitioner's final contention is that the Government prosecutors in this case failed to live up to their *Brady-Giglio*[5] obligations, and violated a specific order

---

[5]See *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972).

of the Court, in failing to disclose to the Petitioner the fact of Patricia Gandara's 1977 arrest for shoplifting. This contention is without merit for two reasons. First, Petitioner can show no prejudice, because, as previously noted, the arrest would not have been admissible in evidence for impeachment. Second, Petitioner's attorney was already aware of the arrest, and of the fact that no conviction had resulted from it.

The files and records in this case conclusively show that the Petitioner is entitled to no relief. Therefore, his motion to vacate sentence should be denied.

It is therefore ORDERED that the motion to vacate sentence in the above-styled and numbered cause be, and it is hereby, DENIED.

SIGNED AND ENTERED this 22nd day of January, 1986.

/s/ Harry Lee Hudspeth
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

EP-83-CA-221

GLEN SUHERLAND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ORDER DENYING
MOTION TO VACATE SENTENCE
(Filed January 22, 1986)

This is a motion to vacate sentence under 28 U.S.C. § 2255. The Petitioner, a former Judge of the Municipal Court of the City of El Paso, was convicted of conspiring to conduct the affairs of an enterprise through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(d). He was sentenced to two years' imprisonment in the custody of the Attorney General. The conviction was affirmed on appeal, and the Supreme Court denied certiorari. *United States v. Sutherland*, 656 F.2d 1181 (5th Cir. 1981), *cert. denied* 455 U.S. 949 (1982). In the present motion to vacate sentence, the Petitioner contends that the statute under which he was convicted was unconstitutional both in general terms and in its application to a political subdivision of the State of Texas, and that certain alleged prosecutorial misconduct before and during his trial entitled him to have his conviction and sentence set aside.

The Petitioner first contends that the RICO statute, 18 U.S.C. § 1962, is unconstitutionally vague and broad.

However, the constitutionality of the RICO statute has been specifically upheld by the Fifth Circuit. *United States v. Martino*, 648 F.2d 367, 380-81 (5th Cir. 1981), *cert. denied* 456 U.S. 943 (1982). This contention is without merit.

The Petitioner next contends that it was unconstitutional to apply the RICO statute to the "enterprise" involved in this case, to wit: the City of El Paso and its Municipal Court. However, the Fifth Circuit has specifically decided that a governmental entity may be an "enterprise" under the RICO statute. *United States v. Stratton*, 649 F.2d 1066, 1074-75 (5th Cir. 1981) (Florida judicial district); *United States v. Brown*, 555 F.2d 407, 415-16 (5th Cir. 1977), *cert. denied subnom Seymour v. United States*, 435 U.S. 904 (1978) (City police department). It is also noteworthy that the single case relied upon by the Petitioner, *United States v. Thompson*, 669 F.2d 1143 (6th Cir. 1982) was reversed by the en banc Sixth Circuit. *United States v. Thompson*, 685 F.2d 993 (6th Cir. 1982), *cert. denied* 459 U.S. 1072 (1983). The proposition that a political subdivision of a state may be an "enterprise" for RICO purposes seems too well settled to require further discussion.

The Petitioner's final contention is that he was denied a fair trial because of certain prosecutorial misconduct. The Petitioner made substantially the same claims of prosecutorial misconduct in his direct appeal, and those claims were rejected by the Fifth Circuit. See *United States v. Sutherland*, *supra*, 656 F.2d at 1203-1204. The Petitioner is not entitled to reconsideration of the same allegations in the present motion for post-conviction relief.

The files and records in this case conclusively show that the Petitioner is entitled to no relief. Therefore, his motion to vacate sentence should be denied.

It is therefore ORDERED that the motion to vacate sentence in the above-styled and numbered cause be, and it is hereby DENIED.

SIGNED AND ENTERED this 22nd day of January, 1986.

/s/ HARRY LEE HUDSPETH
United States District Judge